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Supreme Court, U.S.
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No. 10-__

In the Supreme Court of the United States

JEROMI HORNS BAZUAYE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JEROMI HORNS BAZUAYE
PRO SE
Orange County Jail
110 Wells Farm Road
Goshen, NY 10924

QUESTIONS PRESENTED

In sentencing Petitioner, the District Court imposed a punishment that was not authorized by law—a jurisdictional error. The error affected the legality of Petitioner's guilty plea. Unfortunately, Petitioner did not discover the error until seventeen years later, while he was challenging immigration removal proceedings against him. Does a District Court's jurisdictional error justify error coram nobis relief?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. THE COURT OF APPEAL'S DECISION CONFLICTS WITH *UNITED STATES V. MORGAN*, 345 U.S. 502 (1954) 6

II. PETITIONER QUALIFIED FOR CORAM NOBIS RELIEF UNDER *MORGAN* 11

CONCLUSION 13

APPENDIX

Court of Appeals Opinion 1a

District Court Opinion 5a

TABLE OF AUTHORITIES

CASES

Balik v. United States,
161 F.3d 1341 (11th Cir. 1998).....11
Carlisle v. United States, 517 U.S. 416 (1996).....9
Hirabayashi v. United States,
828 F.2d 591 (9th Cir.1987).....5
Johnson v. Zerbst, 304 U.S. 458 (1938).....8
Louisville & Nashville Railroad Co. v. Mottley,
211 U.S. 149 (1908).....12
Pitts v. United States, 763 F.2d 197 (6th Cir. 1985) 12
United States v. Addonizio, 442 U.S. 178 (1979).....12
United States v. Bazuaye,
37 F.3d 1496 (4th Cir. 1994).....4
United States v. Bazuaye, 991 F.2d 791 (4th Cir.),
cert. denied, 114 S. Ct. 278 (1993).....3
United States v. Bazuaye, Nos. CR-91-508-A; CA-93-
748-A (E.D. Va. June 10, 1993; July 14, 1993).....4
United States v. Brown,
117 F.3d 471 (11th Cir. 1997).....11
United States v. Castro,
26 F.3d 557 (5th Cir. 1994).....9
United States v. Denedo, 556 U.S. __,
129 S. Ct. 2213 (2009).....6, 9, 12
United States v. Doe,
867 F.2d 986 (7th Cir. 1989).....12

United States v. Gibson,
356 F.3d 761 (7th Cir. 2004) 13
United States v. Kwan,
407 F.3d 1005 (9th Cir. 2005) 9
United States v. Little,
608 F.2d 296 (8th Cir. 1979) 12
United States v. Morgan,
346 U.S. 502 (1954) ..... passim
United States v. Stoneman,
870 F.2d 102 (3d Cir. 1989) 12
United States v. Travers,
514 F.2d 1171 (2d Cir. 1974) 12

STATUTES

18 U.S.C. § 1029(a) 3
18 U.S.C. § 1029(a)(3) 2
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1651(a) 1, 4
28 U.S.C. § 2255 ..... passim

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeromi Horns Bazuaye, respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. App. 1a. The opinion of the United States District Court for the Eastern District of Virginia is unreported. App. 4a.

JURISDICTION

The Court of Appeals filed its opinion on October 28, 2010. The Court granted an extension of time to file the petition for writ of certiorari to March 25, 2010. *Bazuaye v. United States*, No. 10A720.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, United States Code, Section 1651(a) states that: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

1. Petitioner, Jeromi H. Bazuaye, is a permanent resident of the United States having moved to this country in 1991 from Nigeria. He is currently facing deportation as a result in part of the conviction which is the subject of this appeal.

On December 12, 1991, Bazuaye was charged in a twelve count indictment alleging a conspiracy to violate various federal statutes and eleven substantive counts, including access devices fraud, possession of false identity documents, bank fraud, money laundering, wire fraud, obstruction of justice and witness intimidation. The indictment also contained three forfeiture counts. After attempting unsuccessfully to achieve some other resolution with the government, Bazuaye reached a plea agreement, which required that he plead to Count 3 of the Indictment, a single count of possession of fifteen or more counterfeit or unauthorized access devices in violation of 18 U.S.C. § 1029(a)(3). The plea agreement also called for the Bazuaye to forfeit particular property including three vehicles and approximately $7,500 held in bank accounts under the name of "Charles Hart." The agreement also called for forfeiture of property interest of the Bazuaye in a residence in Washington D.C. The forfeiture counts charged in the indictment were not related to violations of 18 U.S.C. § 1029(a)(3).

On February 21, 1992, Bazuaye pled guilty under the terms of the agreement and the district court accepted the plea. The court, at the time of the plea, entered a consent order of forfeiture as to all the property listed in the plea agreement.

Bazuaye later attempted by motion to withdraw his guilty plea. The motion was denied. The basis to withdraw the guilty plea did not relate to the forfeiture aspect of the plea. Subsequently, the property was forfeited to the United States.

At the time of the plea, the law did not authorize forfeiture under 18 U.S.C. § 1029(a). On October 6, 1992, President William J Clinton signed into law a provision permitting criminal forfeiture to be based upon a conviction of violation of 18 U.S.C. § 1029(a). The state of the law in February of 1992 would not allow the government to seek or allow the Court to approve a plea or sentence a defendant to a sentence which imposed forfeiture without violating the existing law to the detriment of the petitioner and without acting in excess of its jurisdiction.

The provision requiring forfeiture was illegal. Because the government and the defendant bargained for the plea and because the government drew up the plea agreement, the illegal forfeiture provision rendered the plea agreement void, and the guilty plea predicated upon the illegal forfeiture as void, because no jurisdiction had been vested in the District Court to criminally forfeit property for violations of 18 U.S.C. § 1029(a).

At the sentencing hearing, the District Court imposed a sentence of thirty-seven months and five years of supervised release.

2. Bazuaye unsuccessfully challenged his conviction and sentence. *See*, *United States v. Bazuaye*, 991 F.2d 791 (4th Cir.), cert. denied, 114 S. Ct. 278 (1993). He then brought a proceeding under 28 U.S.C. § 2255. The District Court rejected the

application. *See*, *United States v. Bazuaye*, Nos. CR-91-508-A; CA-93-748-A (E.D. Va. June 10, 1993; July 14, 1993). The denial of the 28 U.S.C. § 2255 petition was affirmed by the Court of Appeals. *See*, *United States v. Bazuaye*, 37 F.3d 1496 (4th Cir. 1994).

On July 17, 2009, Bazuaye filed a petition for a writ of error coram nobis under 28 U.S.C. § 1651(a). He filed an amended petition on August 20, 2009. In an order, the District Court "denied" the petition and the amended petition as "frivolous." App.6a.

3. On appeal, Bazuaye argued that coram nobis relief was available because his plea agreement was based on an illegal and unauthorized punishment that rendered the agreement void. Moreover, since the District Court was without jurisdiction to impose forfeiture, that error was of a jurisdictional nature and can be raised at any time.

The Government filed a response acknowledging that the District Court erred with regard to the plea agreement. The Government stated:

> At the outset, it should be noted that the Petitioner's claimed error regarding the validity of the forfeiture provision in the access-devices fraud statute, 18 U.S.C. § 1029, is correct. At the time the district court accepted the Petitioner's guilty plea in February 1992, and also when Petitioner's conviction was entered in May 1992, Congress had not authorized forfeiture for a violation of 18 U.S.C. § 1029, which was the criminal violation charged in count three of the indictment.

Nevertheless, the Government contended that Bazuaye had not offered sufficient reasons as to why

the challenge to the forfeiture was not brought earlier, nor was the forfeiture a "fundamental error" requiring coram nobis relief.

The Court of Appeals agreed. The court, relying upon a test derived from the Ninth Circuit, stated that in order for coram nobis relief to be available a petitioner had to establish that: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." App.3a (quoting and citing *Hirabayashi v. United States,* 828 F.2d 591, 604 (9th Cir.1987)).

Bazuaye could not meet the second and fourth prongs of the test, the court concluded. Noting that Bazuaye had "ample opportunity between 1992 and 2009 to challenge his sentence," the court held that his failure to do so prohibited the court from now granting coram nobis relief. App.3a. In addition, the court held that the error complained of did not qualify as "fundamental," because the error does not "impact the integrity of his guilty plea or the validity of the judgment that he violated a federal offense." App.3a.

REASONS FOR GRANTING THE PETITION

The parties all agree that in 1991 the District Court erred in applying forfeiture penalties to Petitioner's sentence. The only dispute is over whether that error can ever be rectified.

The Court of Appeals believed that even though the District Court imposed a sentence beyond that allowed by law—a jurisdictional error—this error must be allowed to stand because it had not been raised earlier and it is not an actual innocence "fundamental" defect. That ruling conflicts with this Court's decision in *United States v. Morgan*, 345 U.S. 502, 507-08 (1954), holding that coram nobis is a viable avenue for petitioners with claims challenging a legal error beyond actual innocence claims even if they previously had the opportunity to raise the claims.

I. THE COURT OF APPEAL'S DECISION CONFLICTS WITH *UNITED STATES V. MORGAN*, 345 U.S. 502 (1954).

1. "The writ of *coram nobis* is an ancient common-law remedy designed 'to correct errors of fact.'" *United States v. Denedo*, 556 U.S. __, 129 S. Ct. 2213, 2220 (2009) (quoting and citing *United States v. Morgan*, 346 U. S. 502, 507 (1954). Although the writ traces its origins to the English Court of Common Pleas, its scope in this country has not been "well defined." *Id.*

This Court first considered the scope of the writ in *United States v. Morgan*, 346 U.S. 502 (1954). There, the Court was asked to determine whether the writ could be used to rectify a legal error that occurred during the prosecution of Robert Patrick Morgan. Mr. Morgan pled guilty to eight federal criminal counts related to the theft of three pieces of mail from the U.S. Postal Service. He was nineteen years old, did not retain counsel, and apparently never

waived his right to retain counsel. He was sentenced to four years in prison. *Id.* 346 U.S. at 503.

Eleven years later, Morgan was convicted of attempted burglary in a New York state court, and pursuant to New York's Multiple Offenders Law, the state court sentenced Morgan to a longer term than it otherwise would have on account of the previous federal conviction. Facing a longer state sentence, Morgan filed a motion for a writ of coram nobis in the district court seeking to vacate his federal conviction of 1939. *Id.* 346 U.S. at 503-04.

The Court was asked to determine whether the writ of coram nobis was available in federal criminal cases at all, and if so, whether Morgan's circumstances qualified. The Court conclusively established that federal courts in criminal cases have the power to grant motions "in the nature of the extraordinary writ of coram nobis." *Id.* 346 U.S. at 505.

The Court went on to sketch out the circumstances under which the writ may be available. Coram nobis relief "should be allowed * * * only under circumstances compelling such action to achieve justice"—namely (a) curing of "errors 'of the most fundamental character'" when (b) "no other remedy [is] then available" and (c) "sound reasons [exist] for failure to seek appropriate earlier relief." *Id.* 346 U.S. at 511-12.

The Court then explained how Morgan's case fit the first two conditions it laid out. First, the denial of Morgan's right to counsel constituted a "fundamental" error. *Id.* 346 U.S. at 512. That holding transformed coram nobis from its traditional

function as a means for curing *factual* errors, unknown to the trial court, to a new function of curing any error of "the most fundamental character," including legal error. Second, no other remedy for that error was currently available, because Morgan was no longer in custody and therefore his remedy under 28 U.S.C. § 2255 was no longer available. Third, the only "sound reasons" the Court cited were Morgan's age, lack of legal knowledge and the fact he was not advised as to his rights. Indeed, the Court did not fault Morgan for not seeking appropriate relief earlier, *e.g.*, on direct appeal or in the form of a habeas motion, even though the constitutional right to counsel, which was available as a ground for habeas relief at least since the 1938 case of *Johnson v. Zerbst*, 304 U.S. 458 (1938)—a case decided before Morgan's 1939 conviction in federal district court.

The scope of coram nobis, as recited by the *Morgan* Court, has not undergone change in the subsequent years. In *Denedo*, the Court was careful to remain true to *Morgan* standard for error coram nobis. The Court, in describing *Morgan*, stated that:

> Any rationale confining the writ to technical errors, however, has been superseded; for in its modern iteration *coram nobis* is broader than its common-law predecessor. This is confirmed by our opinion in *Morgan*. In that case we found that a writ of *coram nobis* can issue to redress a fundamental error, there a deprivation of counsel in violation of the Sixth Amendment, as opposed to mere technical errors. 346 U. S., at 513. The potential universe of cases that range from technical errors to fundamental ones perhaps illustrates, in the case of *coram nobis*, the

> "tendency of a principle to expand itself to the limit of its logic." B. Cardozo, The Nature of the Judicial Process 51 (1921).

Denedo, 129 S. Ct. at 2220-21.

In *Carlisle v. United States*, 517 U.S. 416, 429 (1996), the Court noted that coram nobis is neither necessary nor appropriate because "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate." But difficult does not mean impossible. *Carlisle* does not mention *Morgan*, much less overrule it. Nor does rarity of use mean the writ has somehow fallen into desuetude. Rejecting a government argument that 28 U.S.C. § 2255 "should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts," *Morgan* held that coram nobis is available after final judgment and exhaustion or waiver of any statutory right of review in exceptional circumstances. *Morgan*, 346 U.S. at 511.

The courts of appeals have also found that the writ of coram nobis is alive and well. *See, e.g.*, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (petitioner satisfied threshold coram nobis requirements and demonstrated that counsel's erroneous advice on immigration consequences of guilty plea was deficient and prejudicial); *United States v. Castro*, 26 F.3d 557, 559-63 (5th Cir. 1994) (petitioner satisfied threshold coram nobis requirements; remanded for ineffective assistance determination on claim that counsel failed to inform him, prior to guilty plea, of opportunity to request judicial recommendation against deportation).

2. The Fourth Circuit's standard for granting error coram nobis relief conflicts with *Morgan* in two important respects. First, the Court of Appeals equated "fundamental" error with actual innocence, because the error here—that the sentencing court imposed punishment not allowed by law and an unknowing guilty plea—goes to the heart of the proceedings. App.3a. (the error does not impact "the validity of the judgment that he violated a federal offense").

Second, the Court of Appeals "valid reasons" test imposes a requirement different in kind from the "sound reasons" test employed by *Morgan*. The Court of Appeals held that since "the error was discoverable at the time Bazuaye pled guilty and most certainly was discoverable at some point within the seventeen years that passed," coram nobis relief was unavailable. But the same could have been said for Mr. Morgan—the denial of the right to counsel was an error available to him on appeal and during habeas corpus proceedings. Moreover, Petitioner, like Morgan, was not properly informed of his legal rights prior to pleading guilty. The Court of Appeals standard therefore is less tolerant of defendants who failed to raise the legal error earlier and more tolerant of allowing legal errors to remain uncorrected. Because the Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court," the Court should grant the writ.

II. PETITIONER QUALIFIED FOR CORAM NOBIS RELIEF UNDER *MORGAN*.

Petitioner qualifies for coram nobis relief under the standard set forth in *Morgan*.

1. An action under 28 U.S.C. § 2255 is not available. Only "prisoners" who are "in custody" may file motions pursuant to 28 U.S.C. §2255 to vacate their convictions or sentences. To satisfy this "custody" requirement, a defendant must either be in prison or jail, or else have his or her liberty under some other form of restraint as part of a federal sentence, such as parole or supervised release. *See, e.g., Balik v. United States,* 161 F.3d 1341 (11th Cir. 1998) (parole); *United States v. Brown,* 117 F.3d 471 (11th Cir. 1997) (supervised release). Petitioner has long been out of custody and is not under the terms of a sentence such that a habeas corpus action under 28 U.S.C. § 2255 would be available.

2. Petitioner was never advised by the District Court, nor by the Government, that his guilty plea would lead to imposition of criminal forfeiture penalties. Petitioner only discovered these errors while preparing to defend against immigration removal proceedings. These facts are almost identical to the ones presented in *Morgan*. There, the defendant was not advised of his right to counsel when pleading guilty. He only discovered that his rights had been violated 15 years later when he was charged with another federal crime. Just as in Morgan, the facts here constitute "some reasons" for allowing Petitioner coram nobis relief. *Morgan*, 346 U.S. at 503-04.

In addition, the claim presented in the petition for error coram nobis implicates the District Court's power to adjudicate the matter before it. Such a claim goes to the heart of the court's jurisdiction. That type of claim can be raised at any time. *See*, *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152, (1908) (ordering case dismissed for lack of jurisdiction despite absence of objection from either party to trial court's previous adjudication of merits); *Ex parte Bain*, 121 U.S. 1, 2 (1887) (jurisdictional error); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-584 (1999) (A lack of subject-matter jurisdiction in a district court requires the reversal of its judgment without any inquiry into prejudice.).

3. This Court made clear that the scope of errors considered "fundamental," for coram nobis purposes, has expanded. *Denedo*, 129 S. Ct. at 2220-21. In fact, the error complained of in *Morgan* was the denial of the right to counsel which resulted in an unknowing guilty plea. *Morgan*, 346 U.S. at 503-04. It is thus clear that this type of defect that would be justified under habeas corpus relief constitutes "fundamental" errors for securing coram nobis relief. That is the view of the circuits that have addressed the question. *See, e.g., United States v. Doe*, 867 F.2d 986, 988 (7th Cir. 1989); *Pitts v. United States*, 763 F.2d 197, 198 n.1 (6th Cir. 1985); *United States v. Little*, 608 F.2d 296, 299 (8th Cir. 1979); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974). *But see, United States v. Stoneman*, 870 F.2d 102, 106 (3d Cir. 1989).

The error here easily satisfies the "fundamental" test. As even the Government acknowledged, the District Court imposed a punishment beyond that allowed by law. This error was jurisdictional in

nature. *See*, *Ex parte Bain*, 121 U.S. 1, 2 (1887) This Court has long held that habeas corpus remedies have "been available to attack convictions and sentences entered by a court without jurisdiction." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). The error also had the effect of rendering Petitioner's guilty plea unknowing—for Petitioner was never advised that he faced forfeiture penalties for pleading guilty. This error renders the guilty plea illegal and "impugns the fairness, integrity, and public reputation of the judicial process." *United States v. Gibson*, 356 F.3d 761, 766 (7th Cir. 2004).

This is a class coram nobis case. The District Court committed a jurisdictional error that is deserving of correction. Petitioner, ignorant of his rights, did not discover the error until after his direct appeal and habeas motions were filed. And this error in the judgment now threatens his removal from this country. For these reasons, the Court should grant review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEROMI HORNS BAZUAYE
PRO SE
Orange County Jail
110 Wells Farm Road
Goshen, NY 10924

2010 WL 4366456

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

United States of America, Plaintiff-Appellee,

v.

Jeromi Horns Bazuaye, a/k/a Joromi Bazuaye, a/k/a Jeromi Duzuaye, a/k/a Joromi Duzuaye, Defendant-Appellant.

No. 09-7965

Submitted: Sept. 24, 2010.
Decided: Oct. 28, 2010.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge. (1:91-cr-00508-LO-1).

David L. Lewis, Lewis & Fiore, New York, New York, for Appellant. Neil H. MacBride, United States Attorney, Thomas H. McQuillan, Assistant United States Attorney, David I. Sharfstein, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Before GREGORY and KEENAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished PER CURIAM opinion.

PER CURIAM:

*1 Jeromi Horns Bazuaye appeals the district court's order denying his petition and amended petition for a writ of error coram nobis. Bazuaye sought the writ to void his 1992 guilty plea to a violation of 18 U.S.C. § 1029(a)(3) (2006), based on an illegal forfeiture provision in his plea agreement. Finding no reversible error, we affirm.

Federal courts have the authority to grant relief from a conviction via a writ of error coram nobis after the expiration of a sentence. 28 U.S.C. § 1651 (2006); *United States v. Morgan*, 346 U.S. 502, 512-13, 74 S.Ct. 247, 98 L.Ed. 248 (1954). Traditionally, the writ is available only to remedy "factual errors material to the validity and regularity of the legal proceeding itself." *Carlisle v. United States*, 517 U.S. 416, 429, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (internal quotation marks omitted). Because the writ is an "extraordinary remedy" that should issue "only under circumstances compelling such action to achieve justice[,] [a]n error of the most fundamental character must have occurred to warrant issuing the writ, and no other remedy may be available." *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir.1988) (internal quotation marks and citations omitted). The Supreme Court has observed that "it is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate." *Carlisle*, 517 U.S. at 429,

116 S.Ct. 1460 (internal quotation marks and brackets omitted).

To be entitled to coram nobis relief, the petitioner must demonstrate that: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir.1987). We conclude that Bazuaye failed to meet the second and fourth elements of this test.

While criminal forfeiture was not authorized for Bazuaye's offense at the time he entered his guilty plea or at the time the district court entered judgment, Bazuaye had ample opportunity between 1992 and 2009 to challenge his sentence on that ground, but he failed to do so. Bazuaye states on appeal that he discovered the fundamental error only when preparing to defend against immigration removal proceedings recently initiated against him. However, the error was discoverable at the time Bazuaye pled guilty and most certainly was discoverable at some point within the seventeen years that passed between the entry of judgment and the filing of the coram nobis petition.

In addition, the error complained of by Bazuaye does not qualify as fundamental. Even acknowledging that Bazuaye should not have been subjected to criminal forfeiture, that error does not impact the integrity of his guilty plea or the validity of the judgment that he violated a federal offense.

We thus decline to conclude that the regularity of the legal proceedings that culminated in Bazuaye's conviction was fundamentally flawed.

*2 Accordingly, because Bazuaye was not entitled to the extraordinary remedy of a writ of error coram nobis, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Virginia

UNITED STATES OF AMERICA

V.

JEROMI HORNS BAZUAYE
Defendant

CRIMINAL NO. 1:91cr508

ORDER

The Defendeant has filed a Petition and Amended Petition for Writ of Error Coram Nobis attacking his

April 24, 1992 sentence. The grounds of both petitions are that he pled guilty to a "non-offense" and that the criminal forfeiture was unauthorized and illegal. The claims in both petitions are frivolous and for that reason, it is accordingly

ORDERED that the petition and the amended petition are denied.

/S/
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 8, 2009